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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 199

FREDERICK D. DISMUKE,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Of Counsel.

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SUPREME COURT OF THE UNITED STATES

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No. 199

FREDERICK D. DISMUKE,

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vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Supreme Court of the United States:

Your petitioner, Frederick D. Dismuke, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit rendered in the case of *United States of America* v. *Frederick D. Dismuke* on April 19, 1935, 76 F. (2d) 715, reversing the judgment of the District Court of the United States for the Middle District of Georgia.

I.

The Case.

Petitioner filed suit against the United States in the District Court of the United States for the Middle District of

Georgia, asking for a judgment for certain payments to which he claimed to be entitled under the provisions of the civil service retirement legislation enacted May 22, 1920 (Title 5 U. S. C., Section 691 *et seq.*), as amended by Section 8-A of the Act of June 16, 1933 (Title 5 U. S. C., Section 692d). A demurrer to the petition was overruled. The case was tried on a stipulation of facts (R. 14), with some additional evidence. The stipulated facts were adopted by the trial court as a part of its findings of fact (R. 9).

The material facts as shown by the stipulation are:

Petitioner served as a field deputy marshal for the Northern District of Georgia from December 16, 1895, to April 30, 1902, a period of 6 years, 4 months, and 14 days; as postmaster at Thomasville, Georgia, from February 7, 1902, to April 27, 1914, a period of 12 years, 2 months, and 20 days; and as a Federal Prohibition officer from September 10, 1921, to June 30, 1933, a period of 11 years, 9 months, and 20 days. The aggregate period of service amounts to 30 years, 4 months, and 17 days. If we exclude the time served as a field deputy marshal, petitioner's service aggregates 24 years and 4 days.

On June 30, 1933, petitioner was involuntarily separated from the service as a deputy prohibition administrator for reasons other than his misconduct and because of a reduction in force (R. 15).

On June 27, 1933, petitioner addressed a letter to the Director of Insurance, Veterans' Administration, Washington, D. C., stating that he had been a Government employee for over 31 years, and inquiring as to the amount of money he would be required to refund in order to secure the benefits of the Retirement Act (R. 15), and in reply was advised that he should deposit with the Treasurer of the United States an amount of $970.09. Petitioner in said letter was inquiring specifically about the retirement of

Government employees after 30 years of service (R. 15). This amount was duly deposited by petitioner with the Treasurer on October 26, 1933 (R. 16). Deductions were made from petitioner's salary under the retirement laws from February 29, 1928, to the end of his service. Petitioner has paid to the Government all of the deductions, refunds, and amounts required of him under the Civil Service Act, or the Annuity Act, in order to make him eligible for the annuity payments, having paid approximately $1,650.00 to the Government in order to be eligible for such payments (R. 17).

Petitioner filed claim with the Administrator of Veterans' Affairs for an annuity under the provisions of Section 8-A of the Act of June 16, 1933, and on or about December 26, 1933, was informed by the Director of Insurance that his claim had been rejected on the ground that he had not rendered 30 years of allowable service as required by that Act, and that his service as a field deputy marshal was excluded, because field deputies are considered as employees of the marshal and not of the United States (R. 17-18). This decision was affirmed on appeal by the Board of Veterans' Appeals (R. 18).

No disputed question of facts was involved either before the Administrative Agency or the District Court. The decision in both instances should have been controlled entirely by a question of law. The Director of Insurance rejected petitioner's claim "upon the ground that field deputy marshals are regarded as employees of the marshal and not of the United States" (R. 17-18). The Board of Veterans' Appeals stated the question it was called upon to decide, as follows: "May the time that this appellant served as a field deputy marshal be used in determining his eligibility to annuity?" (R. 18-19).

Petitioner's suit specifically attacked these administrative conclusions as being arbitrary, capricious, and clearly erroneous because they represent not findings of fact but erroneous conclusions of law (R. 3-4).

The District Court made careful findings of fact and conclusions of law (R. 9), and entered judgment against the United States, awarding petitioner an amount of $1,476.45, with a declaratory judgment that he is entitled to receive as an annuity monthly installments of $98.43 from October 1, 1934, until January 21, 1945, and monthly insfallments of $102.00 from January 21, 1945, until his death (R. 11).

The United States took an appeal to the Court of Appeals for the Fifth Circuit, specifying that the court erred:

(1) In entertaining jurisdiction of the suit.

(2) In reviewing the action of the Veterans' Administration and in awarding judgment against the United States.

(3) In awarding a declaratory judgment against the United States, and

(4) In holding that petitioner's service as a field deputy marshal may be included in calculating the 30-year period of service required by Section 8-A of the Act of June 16, 1933.

The Court of Appeals rendered its opinion and judgment on April 19, 1935, reversing the judgment of the lower court and remanding the cause with directions to dismiss the claim, the appellate court being of the opinion that the retirement legislation shows that Congress intended to provide only an administrative remedy and that the petitioner's claim, so far as its suability is concerned, was entirely withdrawn from court action. The Court of Appeals did not deal at all with the question of the correctness of the administrative decisions. In other words, so far as the

Court of Appeals' decision goes, petitioner may be clearly entitled to the annuity which he seeks, but is without remedy in the courts (R. 48-54).

II.

Questions Presented.

(1) Whether the District Court has jurisdiction of a suit against the United States under the Tucker Act for the recovery of civil service retirement payments where the claim for such payments has been properly prosecuted through all of the appellate agencies of the Veterans' Administration and has been finally rejected by such agencies, and where claimant has paid $1,650.00.

(2) Whether the District Court has jurisdiction of such a suit where the administrative agencies had before them for decision no disputed question of fact but only questions of law, and where such decision is clearly erroneous as a matter of law.

(3) Whether the District Court has jurisdiction to render in such a suit a declaratory judgment against the United States.

(4) Whether the time served as a field deputy marshal may be considered in computing the 30 years of service required by Section 8-A of the Act of June 16, 1933.

(5) Whether petitioner is denied the benefit of the due process of law to which he is entitled under the Fifth Amendment of the Constitution if he is not allowed at some stage of the proceeding, prescribed by the retirement legislation for the assertion and allowance of his claim, an opportunity for submitting to a judicial tribunal the question whether his claim is or is not allowable and enforceable.

III.

Assignments of Error.

(1) The Circuit Court of Appeals erred in deciding that the District Court had no jurisdiction of petitioner's suit.

(2) The Circuit Court of Appeals erred in deciding that there are matters, not of law, but of administrative discretion in applying the Civil Service Retirement Act, involved in determining the right of one claiming an annuity under the plan, which have not been resolved in petitioner's favor, and the resolution of which may not be controlled by court action.

(3) The Circuit Court of Appeals erred in not deciding that the District Court has jurisdiction to render a declaratory judgment against the United States.

(4) The Circuit Court of Appeals erred in not deciding that time served as a field deputy marshal may be considered in computing the 30 years of service required by Section 8-A of the Act of June 16, 1933.

IV.

Reasons Relied on for the Allowance of the Writ.

(1) The questions presented in this petition are of great importance not only to this petitioner but to every civil service employee of the United States. All such employees are entitled to know whether, in return for the deductions made from their basic salary and deposited in the Treasury each month, they have a justiciable right or whether their rights can be finally determined by an administrative agency and hence are a matter of administrative discretion.

(2) The Circuit Court of Appeals in this case has decided an important question of Federal law which has not been, but should be, settled by this Court, to-wit: Whether under the terms of the Tucker Act a civil service employee can maintain a suit for the payments to which he is entitled under the retirement legislation. This question should be settled by this Court because it vitally affects the successful operation of the plan for civil service retirement. Undoubtedly, civil service employees will have more confidence in the plan if they know that they are not precluded by an erroneous decision of the administrative officers.

(3) This question is not settled with convincing finality at this time because the decision in the Court of Appeals was by a divided court. It results, therefore, that this question has been presented to four judges, including the District Court, and two judges have decided it each way.

(4) The Circuit Court of Appeals has decided an important question of Federal law in a way probably untenable and in conflict with the weight of authority. It is generally held that a decision of an administrative tribunal is not clothed with finality where it rests, not upon issues of fact, but erroneous conclusions of law. Applicable decisions of this Court, among many, are:

United States v. *Babcock*, 250 U. S. 328;
United States v. *Williams*, 278 U. S. 255;
Silberschein v. *United States*, 266 U. S. 221;
Johnson v. *Towsley*, 80 U. S. 72;
American School of Magnetic Healing v. *McAnnulty*, 187 U. S. 94.

(5) The Federal question decided by the Court of Appeals in this case is decided probably in conflict with the applicable decisions of this Court cited in the preceding

paragraph. While the opinion of the Court of Appeals says that "there are matters, not of law, but of administrative discretion in applying the Act, involved in determining the right of one claiming an annuity under the plan which have not been resolved in plaintiff's favor, and the resolution of which may not be controlled by Court action," petitioner points out that the "matters" referred to are not referred to as disputed questions of fact but as "(matters) of administrative discretion in applying the Act." Petitioner does not see that there was any disputed question of fact involved before the administrative tribunal. In fact, there was no issue of fact before the District Court. The administrative agencies decided the question upon the written record of petitioner's employment and rejected his claim solely upon the ground that as a matter of law field deputy marshals are not employees of the United States but are employees of the marshal (R. 17-18). Administrative agencies do not have a discretion in *applying the law.* If they make a mistake, the courts can correct it.

In addition to the applicable decisions cited in the preceding paragraph, petitioner cites the case of *Crowell* v. *Benson,* 45 F. (2d) 66, and 285 U. S. 22, which holds that "Congress should not be taken, in the absence of specific provision, to have intended to subject the individual to the uncontrolled action of a public administrative officer."

(6) The decision of the Circuit Court of Appeals denies to petitioner the due process of law to which he is entitled, because it permits the Government to retain the $1,650.00 which he has paid to them without offering him at any stage of the proceeding an opportunity to submit to a judicial tribunal the question whether his claim is or is not allowable and enforceable. The decision, therefore, is probably in conflict with the decision rendered by this Court in

Crowell v. *Benson*, 285 U. S. 22. As bearing upon the conflict between the Court of Appeals' decision in petitioner's case and the decision of this Court in the *Crowell* case, petitioner points out that the *Crowell* case came to the Supreme Court from the Court of Appeals for the Fifth Circuit and that the only judge who sat in the Court of Appeals in both the *Crowell* case and petitioner's case dissented in petitioner's case.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 7675, United States of America, Appellant, *v.* Frederick D. Dismuke, Appellee, and that the said judgment of the Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 199

FREDERICK D. DISMUKE,

Petitioner,

v.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The opinion of the Court of Appeals for the Fifth Circuit is reported in 76 F. (2d) 715. This opinion appears at page 48 of the Record. The District Court wrote no opinion but his conclusions of law are found at page 10 of the Record.

II.

Jurisdiction.

1. The date of the judgment to be reviewed is April 19, 1935 (R. 54). A petition for rehearing was filed on May 8, 1935 (R. 54), and was denied on May 29, 1935 (R. 55).

2. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, Title 28 U. S. C. A., Sec. 347, and in accordance with the Rules of the Supreme Court, particularly Rule 38. Cases, among others, relied upon as sustaining the jurisdiction of this Court are the following:

Cole v. *Ralph*, 252 U. S. 286;

Louisville Joint Stock Land Bank v. *Radford*, 294 U. S. —; 55 S. Ct. 854.

3. It is believed that paragraph 1 of Rule 12 of this Court has been sufficiently complied with by the statement of the grounds on which the jurisdiction of this Court is invoked, which statement is contained in the petition for the writ of certiorari and, for the sake of brevity, we are not making a restatement here.

III.

Statement of the Case.

It is believed that the statement of the case in the petition for the writ of certiorari is adequate, except that it does not reflect the facts as to the nature of the petitioner's duties, services and employment as a field deputy marshal, and, for the sake of brevity, we shall state here only those facts with reference to the status of petitioner as an employee of the United States.

As a field deputy marshal he devoted all of his time to the duties of his office, having no other occupation and no other income (R. 42). The duties which he performed were the same as those performed today by field deputies who are on a salary basis (R. 40). He was paid for his services out of funds advanced by the United States (R. 42). His remuneration was prescribed by acts of Congress and regulated by the Attorney-General and he was paid whether

or not the fees earned were collected from litigants (R. 41). He had to take a prescribed oath of office (R. 31). The Attorney-General issued instructions to him in minute detail as to the manner in which he should discharge his duties (R. 24). His office was created by an Act of Congress (28 U. S. C. A. 492). His appointment had to be approved by the Attorney-General (R. 42). The Government could discharge or remove him at will (28 U. S. C. A. 492) and, in like manner, the Government could reduce his pay (Revised Statutes 841).

IV.

Specification of Errors.

(1) The Circuit Court of Appeals erred in deciding that the District Court had no jurisdiction of petitioner's suit.

(2) The Circuit Court of Appeals erred in deciding that there are matters, not of law, but of administrative discretion in applying the Civil Service Retirement Act, involved in determining the right of one claiming an annuity under the plan which have not been resolved in petitioner's favor, and the resolution of which may not be controlled by court action.

(3) The Circuit Court of Appeals erred in not deciding that the District Court has jurisdiction to render a declaratory judgment against the United States.

(4) The Circuit Court of Appeals erred in not deciding that time served as a field deputy marshal may be considered in computing the 30 years of service required by Section 8-A of the Act of June 16, 1933.

V.

Summary of Argument.

A. The provisions of the Civil Service Retirement Legislation as amended by Section 8(a) of the Act of June 16, 1933, and the payment of $1,650.00 by petitioner to the Government in reliance upon such legislation gives rise to a contract between petitioner and the United States.

B. The District Court had jurisdiction of petitioner's contractual claim under the provisions of the Tucker Act.

C. The authorities relied upon by the Government do not sustain its contention that petitioner can not maintain this suit because of any quality of finality in the decisions of the administrative agencies.

D. Even if it should be decided that it was the intention of Congress to make the decision of the Commissioner of Pensions (succeeded now by the Veterans' Administration) final, nevertheless, the present case comes within the well settled rule that, notwithstanding such intended finality, such decisions are subject to judicial review where they are wholly without evidential support or wholly dependent upon a question of law.

E. A field deputy marshal is clearly an employee of the United States for civil service retirement purposes.

F. The District Court had jurisdiction to render a declaratory judgment against the United States.

VI.

ARGUMENT.

Point A.

Petitioner has a contract with the United States.

Section 8(a) of the Act of June 16, 1933 (Title 5, U. S. C. A. Section 692(d)) is set out in the Appendix. From a reading of this statute it appears that petitioner (assuming that he has the aggregate period of service of at least thirty years) "shall be entitled to an annuity," computed as provided in Section 694(a) of Title 5 U. S. C. It has been stipulated that the amounts awarded to petitioner by the judgment of the District Court represents a correct computation (R. 21).

The retirement legislation provides that there shall be deducted and withheld from the basic salary, pay or compensation of each employee a sum equal to 3½% of such employee's basic salary, pay or compensation (Title 5 U. S. C., Section 700(a)). It is obviously in return for these deductions and as their *quid pro quo* that Section 8(a) of the Act of June 16, 1933, says that such employees "shall be entitled to an annuity."

In other words, this is not a pension. It is not a gratuity. Petitioner seeks that which he has bought and for which he has paid. He has a contract.

Point B.

The District Court had jurisdiction under the Tucker Act.

The relevant portion of the Tucker Act is set out in the Appendix. From a reading of this Act it appears that the District Court has jurisdiction of all claims founded upon

any law of Congress or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would have redress against the United States either in a court of law, equity, or admiralty, if the United States were suable. War claims, claims for pensions, and claims for fees, salaries or compensation for official services of officers of the United States are excepted from the District Court's jurisdiction, but the Government does not contend that the petitioner's claim falls within any of these exceptions.

It was the purpose of the Tucker Act simply to remove the exemption of the United States from suit in cases founded upon any express or implied contracts with the United States. The language of the Tucker Act is broad and unambiguous. There is any number of decisions to the effect that a person having any kind of implied contract with the United States can file suit in the District Court. It may be well to refer to a few of these cases.

The act of firing guns from a fort across adjoining lands, which amounts to a taking, within the law of eminent domain, will imply a contract to pay for the land, although no adverse right was asserted, and whether the consequences of the acts were foreseen or not (*Portsmouth Harbor Land & Hotel Company* v. *United States*, 260 U. S. 327).

Where the owner of a vessel made a contract with a Government official for a rental of the same, which contract was unenforceable because it was not in writing as required by the Act of June 2, 1862, and where in reliance upon this parol contract the Government has used the vessel, the owner is entitled to recover the value of its use upon an implied contract for a *quantum meruit* (*Clark* v. *United States*, 95 U. S. 539).

The courts of the United States have jurisdiction of a suit against the United States to recover compensation for the alleged total destruction of the value of real property as a necessary result of the acts of its agents in improving navigation (*United States* v. *Lynah*, 188 U. S. 445).

In *Hiel v. United States* (D. C. N. Y., 273 Fed. 729) it was held that a suit for failure to transmit a cable message after the President had taken over the cables could be maintained against the United States. The court said:

> "It was urged at the bar that this result might expose the United States to serious loss and impede it in the discharge of its governmental functions. This is, of course, an irrelevant consideration, when the purpose of the act is clear; but here it is out of place in any event. Whatever be the justification in policy of the sovereign's immunity, the first consideration ought to be this: That in the performance of its voluntary engagements with its citizens it should conform to the same standard of honorable conduct as it exacts of them touching their conduct with each other. Any policy which would exempt the United States from the scrupulous performance of its obligations is base and mean; it serves in the end to bring the United States into contempt, to prejudice it in its dealings when it enters into the common fields of human intercourse, and to arouse the indignation of honorable men. Congress by the Tucker Act (this paragraph) meant to avoid such consequences."

An action against the United States by the lessee of certain offices to recover compensation for the taking of the offices by the United States for public use is within the jurisdiction of a Federal court (*National Laboratory & Supply Company* v. *United States*, 275 Fed. 218).

An action lies against the United States under the Tucker Act by a contractor for extra work done by him under the

direction of a Government agent (*Bowe* v. *United States*, (C. C. Ga. 890) 42 Fed. 761).

Where the United States in condemning land takes or destroys an easement over the same, appurtenant to lands not taken, there is an implied contract to pay for the same which will support an action in the District Court under the Tucker Act (*Tucker* v. *United States*, 283 Fed. 428).

The opinion of the Court of Appeals in petitioner's case cites four decisions of this Court for the proposition that the District Court, when it sits as a Court of Claims under the Tucker Act, sits only to hear claims for actual damages on money demands. The cases cited announce the principle that the Court of Claims, or the District Court under the Tucker Act, will not award nominal damages. Petitioner, of course, is not seeking nominal damages. He has, what is to him, a substantial claim. He has paid out to the Government for this claim $1,650.00 (R. 17).

The Circuit Court of Appeals is of the opinion that the retirement legislation shows an intent to provide a general plan to be exclusively administered by those the statutes place in charge of it, an intent to provide only an administrative remedy; that such claims are intended to be, so far as their suability as claims is concerned, entirely withdrawn from court action. We respectfully submit that this is a forced construction of the retirement legislation.

Let us examine the provisions of this legislation dealing with its administrative enforcement. Section 17 of the Act (5 U. S. C. 707(a)) authorizes the Commissioner of Pensions to do a number of things. He is "authorized and directed to perform or cause to be performed any and all acts, and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of Sections 691(a) to 708(a) of this Title into full force and effect." Then the statute provides that "an appeal to the

Secretary of the Interior shall lie from the final action or order of the Commissioner of Pensions. * * *"

The Government contends that this expression means that the decision of the Commissioner was to be conclusive save for the appeal to the Secretary of the Interior, but the statute does not say anything more than that when the Commissioner has finished with the claim and has taken his last or final action and signed his last or final order then, and not before, the appeal lies. Moreover, there is not a word in the statute to the effect that the decision on appeal shall be conclusive.

Stronger language than that contained in the Retirement Legislation was construed against the contention of the Government in the case of *Johnson v. Towsley,* 80 U. S. 72. The statute there under consideration declared that the general preemption law of 1841 shall "be so amended that appeals from the decision of the District Officers in cases of contest between different settlers for the right of preemption shall hereafter be decided by the Commissioner of the General Land Office, whose decision shall be final, unless appeal therefrom be taken to the Secretary of the Interior." This Court said "in the use of the word 'final', we think nothing more was intended than to say that, with the single exception of an appeal to his superior, the Secretary of the Interior, his decision should exclude further inquiry *in that department"* (italics ours).

Petitioner need not rely upon the retirement legislation as giving him the consent of the Government to be sued. Petitioner already has that consent under the Tucker Act. He relies upon the retirement legislation, and his and the Government's conduct thereunder, as giving to him a contractual relationship with the Government, and he relies upon the retirement legislation as not affirmatively taking away the Government's consent to be sued.

There is nothing in the retirement legislation indicating that the Government was thereby withdrawing its consent to be sued upon express or implied contracts. Certainly, we are not going to infer or imply such a withdrawal. In the recent case of *Lynch* v. *United States*, 292 U. S. 571, this Court said that it is "not to be assumed that Congress would have resorted to the device of withdrawing the legal remedy from beneficiaries of outstanding policies if it had realized that they had contractual rights." We think that, similarly, it is not to be assumed that Congress, after giving an unlimited consent to be sued on *express or implied* contracts, and after, through the retirement legislation, setting up machinery for creating new contractual relationships, intended silently or inferentially to withdraw this consent.

Justice Brandeis, in the recent case of *Crowell* v. *Benson*, 285 U. S. 91, said:

> "Congress should not be taken, in the absence of specific provision, to have intended to subject the individual to the uncontrolled action of a public administrative officer."

It was not necessary that the retirement legislation specifically re-confer jurisdiction upon the District Court. It is true that in some legislation, for instance, the War Risk Insurance Act, the statutes which provide for the making of the contract or the assuming of the obligation expressly state that a named court shall have jurisdiction of the controversy. When this is done, however, it is not because the claim would not be justiciable without such provision but because of the desire of Congress to limit the forum. The purpose of Section 1 of the War Risk Insurance Act (38 U. S. C. 445) was not to confer jurisdiction but to limit it. It confines jurisdiction to the District Court; whereas, if it had not mentioned the District Court by name,

jurisdiction would have vested concurrently in the District Court and the Court of Claims (*United States* v. *Pfitsch*, 256 U. S. 547). This section of the War Risk Insurance Act also limited the jurisdiction of the lower court by requiring the existence of a disagreement as a condition precedent to the filing of the suit.

> "When the United States went into the insurance business, issued policies in familiar form, and provided that, in case of disagreement, it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such business."
>
> *Standard Oil Company* v. *United States*, 267 U. S. 76, 79.

POINT C.

The Government's authorities distinguished.

In the lower courts the Government relied upon a number of cases for its contention that the language of the retirement legislation makes the decision of the administrative agency final. None of these cases, however, go to the point involved in this case and all of them are distinguishable.

In the case of *United States* v. *Babcock*, 250 U. S. 328, the statute said: "That any claim which shall be presented and acted on under authority of this Act shall be held as finally determined, and shall never thereafter be reopened or considered". The Supreme Court said "these words express clearly the intention to confer upon the Treasury Department exclusive jurisdiction and to make its decision final".

In the case of *United States* v. *Williams*, 278 U. S. 255, the statute provided: "The decisions of the Secretary of War, the Secretary of the Navy and the Director, on all matters within their respective jurisdiction under the provisions of this Act (except the duties vested in them by Title 7), shall be final and conclusive".

It should be pointed out here that the *Babcock* case and the *Williams* case dealt, not with contractual obligations against the Government, but with gratuities or bounties. In the *Babcock* case the claimant lost some property in the war. There was no duty or obligation on the Government to pay him for it apart from the statute which the Supreme Court was construing. In other words, Congress was bestowing a bounty, and, under such circumstances, could appropriately say that the decision of the Treasury Department would be final. In the *Williams* case the suit was to recover the amount of an adjusted service certificate. Of course, Congress in bestowing an army bonus could say that the decisions of the Secretary of War et al. should be final and conclusive.

In the case of *Silberschein* v. *United States,* 266 U. S. 221, the object of the suit was to recover compensation. The comment as to the *Williams* case is appropriate here.

The case of *Williamsport Wire Rope Company* v. *United States,* 277 U. S. 551, deals with a special privilege claimed by the taxpayer in the form of a special assessment. The Act itself stated that the taxpayer would not be entitled to a special assessment unless the Commissioner had resolved certain matters in the taxpayer's favor and the preliminary decisions by the Commissioner were clearly discretionary.

In the case of *United States* v. *Atchison, Topeka & Santa Fe Railway Company,* 249 U. S. 451, the railway company sued for increased compensation, actually a bonus, for carrying the mails under a statute which merely "authorized" the Postmaster-General to increase the carrier's compensation. The two fatal objections to the railway company's suit were the discretion vested in the Postmaster-General and the gratuitous character of the bonus.

In the case of *Work* v. *Rives,* 267 U. S. 175, the relevant statute treats of a gratuity under the act passed "to re-

lieve'' certain people. The statute with propriety declared the decision of the Secretary ''conclusive and final''.

In the lower courts the Government did not cite a single case denying the jurisdiction of the court where the suit was based upon an actual contract with the Government supported by an actual consideration. Of course, there is any number of cases holding that a person can not sue for a bonus or any other type of bounty or gratuity.

Petitioner concedes, as was decided by this Court in the *Lynch* case, that the Government can by appropriate legislation withdraw its consent to be sued upon its contracts, but petitioner insists, upon the authority of the *Lynch* case, that such legislation, in order to be effective, must clearly and unequivocally express such legislative intent. It is not to be assumed that the Government will accept its subject's money, the subject thinking that he is paying for a justiciable right, and ''subject the individual to the uncontrolled action of a public administrative officer''. The quotation is from the language of Justice Brandeis in the *Crowell* case.

The Circuit Court of Appeals was apparently influenced by the principle stated in the *Babcock* case as follows: ''That where a statute creates a right and provides a special remedy, that remedy is exclusive.'' If so, the Court of Appeals must have overlooked the fact that in the *Babcock* case the statute did actually *create* the right which did not exist prior to, or independent of, the statute. It has already been pointed out that Babcock lost some property during the war. There was no obligation resting on the Government to pay for this property. The statute involved created in Babcock a limited right; namely, to present a claim to the accounting officers of the Treasury with the distinct understanding ''that any claim which shall be presented and acted on under authority of this Act shall be

held as finally determined and shall never thereafter be reopened or considered''.

Of course, in all of the other cases of bonuses, bounties, gratuities and special favors relied upon by the Government, the same distinction is apparent, and the statute which *creates* such a right, or privilege, can circumscribe it with limitations.

The principle above quoted from the *Babcock* case comes down from or through the early case of *Stafford* v. *Ingersol,* 3 Hill 38 (N. Y.), which states it as follows:

> "So where a statute creates a right *which did not exist before,* and prescribes the remedy for a violation of it, that remedy must be pursued.''

The slightly later case of *Dudley* v. *Mayhew,* 3 N. Y. Court of Appeals Reports 15, states it thus:

> "had there been preexisting remedies in favor of inventors independently of those resulting from congressional legislation, this Act would not have taken them away. Nothing short of an express *exclusion* or of *utter incompatibility* between the preexisting and the new remedies would have done that''. (Italics ours.)

Thus, the doctrine relied upon by the Government has been traced back to or near its source and is found to be perfectly consistent with petitioner's contention and perfectly consistent with the Supreme Court's recent pronouncement in the *Lynch* case, to the effect that it will not be assumed that Congress intended to take away vested rights; and in the *Crowell* case, to the effect that it will not be presumed that Congress intended to subject the individual to the uncontrolled action of a public administrative officer. There is no "express exclusion'' or "utter incompatibility'' between petitioner's remedy under the Tucker

Act and the preliminary administrative procedure provided in the retirement legislation.

POINT D.

The decision of an administrative agency is always subject to judicial review if without evidential support or wholly dependent upon a question of law.

It appears from the pleadings and the agreed statement of facts in this case that no disputed question of fact was involved, but only a question of law.

Petitioner believes it clear that the Court of Appeals in concluding that there are matters not of law but of administrative discretion in applying the Act which have not been resolved in plaintiff's favor, and the resolution of which may not be controlled by court action, overlooked the decision of H. L. McCoy, Director of Insurance (R. 17-18), and the decision of the Board of Veterans Appeals (R. 18), and the stipulation of facts (R. 14). McCoy's decision shows very clearly that petitioner's claim was rejected on one ground; namely, his erroneous conclusion that, as a matter of law, field deputy marshals are not employees of the United States. The decision of the Board of Veterans Appeals relates to no other question. The stipulation expressly concedes that petitioner is entitled to recover if, under the admitted facts, he is an employee of the United States. Certainly, the Government would not have so stipulated if such issues were not resolved in petitioner's favor.

Two recent Law Review articles offer a clear analysis of the leading cases on this point and assert that wherever vested rights are involved, as distinguished from gratuities, and wherever the decisions of the administrative agencies are based, not upon an issue of fact, but upon a question of

law, such decision is always subject to review in the courts. These articles are listed:

Administrative Finality, 29 Michigan Law Review, page 839;

Judicial Review of Administrative Action by the Federal Supreme Court, 35 Harvard Law Review, 127.

This principle is recognized in the following cases:

United States v. *Babcock,* 250 U. S. 328;
United States v. *Williams,* 278 U. S. 255;
Lindsay v. *Hawes,* 67 U. S. 554;
Minnesota v. *Batchelder,* 1 Wall. 109-116;
Johnson v. *Towsley,* 80 U. S. 72;
American School of Magnetic Healing v. *McAnnulty,* 187 U. S. 94;
Moore v. *Robins,* 96 U. S. 530;
Marquez v. *Frisbie,* 101 U. S. 473;
Medbury v. *United States,* 173 U. S. 492;
United States v. *Laughlin,* 249 U. S. 442;
McLean v. *United States,* 226 U. S. 374;
The Judicial Review of Executive Acts, 23 Mich. Law Review, 588-599.

POINT E.

A field deputy marshal is an employee of the United States for Civil Service Retirement purposes.

The District Court made findings of fact in part as follows:

As a field deputy marshal, petitioner devoted all of his time to the duties of his office, having no other occupation and no other income (R. 9);

The duties which he performed were the same as those performed today by field deputies who are on a salary basis (R. 9-10);

Petitioner was paid for his services out of funds advanced by the United States (R. 10);

Petitioner's remuneration was prescribed by Acts of Congress and regulated by the Attorney-General and he was paid whether the fees earned were collected from litigants or not (R. 10);

The Government required that the deputy take a prescribed oath of office (R. 10);

The Attorney-General issued instructions to the deputy as to the manner in which he should discharge his duties (R. 10).

The District Court reached the following conclusions of law, among others. Petitioner, as a field deputy marshal, "was performing services for and was working for the Government of the United States" (R. 10). "The purpose and intention of Congress in enacting the statutes relating to the retirement of civil service employees was to provide an annuity for those who had been regularly engaged in working for the Government for the prescribed periods" (R. 11). "Petitioner, as a field deputy marshal, was an employee of the United States within the meaning of Section 8(a) of the Act of June 16, 1933, and the time which he served as a field deputy marshal can be used in determining his eligibility to annuity" (R. 11).

The office of field deputy marshal was created by an Act of Congress (28 U. S. C. A. 492). The Government expressly authorized marshals to appoint deputies (28 U. S. C. A. 492). The marshal was required, immediately after making such appointment, to report the same to the Attorney-General, who could "at any time cancel any such appointment as the public interest may require" (28 U. S. C. A. 492) (R. 27). The appointment of the field deputy marshal had to be approved by the Attorney-General (R. 42). The deputy was required to take the same oath of

office prescribed for the marshal (28 U. S. C. A. 494) (R. 14). No credit would be allowed to a marshal from public funds paid to a deputy who was not regularly appointed and who had not taken the prescribed oath (R. 31).

The deputy was not paid by the marshal out of the latter's money but was paid out of money advanced by the Government (R. 40, 41), "just like witnesses were" (R. 42). Prior to 1896 this money was deposited by the Government in a local bank and the first that the marshal knew about it after making his requisition was the receipt by him of a copy of a deposit slip (R. 41). After 1896 the marshal received a notice from Washington that these public funds were deposited to his credit in the Treasury (R. 41). Ever since the passage of the Act of May 28, 1896, field deputy marshals have been and are paid by the check of the marshal drawn on the Treasurer of the United States (R. 21).

Prior to the Act of May 28, 1896, both the marshal and the deputy were on a fee basis. Section 841 of the Revised Statutes provides compensation for the marshal "and a proper allowance for his deputies," and says: "The allowance to any deputy shall in no case exceed three-fourths of the fees and emoluments received or payable for the services rendered by him, and may be reduced below that rate by the Attorney-General whenever the returns show such rate to be unreasonable." It will be observed, therefore, that the statutes do not name a particular fee and say that the deputy marshal would be entitled to it. On the contrary, the statute named particular fees and said that the marshal would be entitled to it and provided further that the marshal should make a proper allowance for his deputies, meaning that the marshal and his deputies should agree upon a certain proportion of the fees earned by the deputy, the amount so agreed upon to be paid to the deputy. The

Government, through Congress, provided, however, that deputies in no case should get more than three-fourths of the amount of the fees prescribed for the services they rendered and the Attorney General retained the power to reduce that maximum amount.

In 1896 the marshals were placed on a salary and the deputies thereafter were to receive three-fourths of the gross fees formerly payable to the marshal, but this amount was not to exceed $1,500.00 per year, except that the Attorney-General could raise the maximum to $2,500.00 when, in his judgment, justice required it (28 U. S. C. A. 583) (R. 31, 35, 40). Thus the maximum and minimum of the deputies' income have always been controlled by the Government, although within certain limits prescribed by the Government, the marshal could agree with the deputy as to the proportion of the statutory fees he should receive (R. 27).

The Government, through the Attorney-General, had to approve the deputy's appointment (R. 42) and the Government, through the Attorney-General, could discharge or remove the deputy at will (28 U. S. C. A. 492) (R. 42); and, in like manner, the Government could reduce the deputy's pay (Revised Statutes 841). Moreover, the Government prescribed in minute detail by legislation and by instructions from the Attorney-General exactly what duties were to be performed by the deputy and in what manner he was to perform them (R. 24-39). The deputy was, in fact, paid by the Government. One paragraph of instructions from the Attorney-General to subordinate employees is as follows:

> "The compensation of a field deputy marshal for all his services, in cases between individuals as well as in cases to which the United States are a party, is paid by the United States, and is governed entirely by the statutes fixing the fees of such officers without relation

to the fees which may actually be paid by a private litigant for the services rendered by the deputy and which are covered into the Treasury." (R. 35.)

Another paragraph of the Attorney-General's instructions is as follows:

"When an office deputy or a field deputy is removed or dismissed because of official misconduct he must not again be employed in any capacity wherein his compensation is to be paid by the United States, unless specific authority has first been obtained from the Attorney-General." (R. 32.)

In the case of *Dudley* v. *James*, 83 Fed. 345, at page 348, the court, after quoting Sections 10 and 11 of the Act of May 28, 1896, used this language:

"It will be observed that the United States, both in office and field deputies, pay their compensation. As to office deputies, the compensation is by salary; as to field deputies by three-fourths of the gross fees which they may have earned. These fees are not in the name of the deputy, but go to the marshal, who, we assume, collects them and pays them into the Treasury; and the field deputies are paid out of the Treasury three-fourths of their gross fees."

The law provides the amount of compensation for a marshal or deputy for each particular service, such as making an arrest, serving a process, etc. The voucher which the deputy marshal made out showing the fees he had earned called for the amounts so fixed by law and the deputy marshal, in his account against the United States, was paid those fees whether or not the court taxed the costs against the defendant when he was convicted and whether or not those fees and costs were ever collected from the party litigant or from the defendant in the criminal case, against whom they were taxed (R. 41, 35).

It can hardly be doubted that a deputy marshal of today is an employee of the United States, and yet the only difference between his employment now and his employment at the time of petitioner's service as a deputy is that since 1904 or 1905 he has been paid a salary (R. 41).

Certainly the manner of payment, whether by salary or by fees, does not determine whether he is an employee. In the case of *Employers Indemnity Co. of Philadelphia* v. *Kelly Coal Company,* 149 Ky. 712, 149 S. W. 992; 41 L. R. A. New Series 963, 966, the court uses this language:

> "In 26 Cyc. 971, it is said: 'Whether or not the relation of master and servant exists in a given case is a question of fact, or of mixed law and fact, and is to be proved as any other like question. Generally speaking, any evidence tending to prove or disprove the relationship is admissible, its weight and sufficiency being left to the jury under the instructions of the court.'"
>
> "Speaking generally, the relation may be said to exist whenever the employer retains the right to direct not only what shall be done, but how it shall be done. *Robinson* v. *Webb,* 11 Bush. 464; *Central Coal & I. Co.* v. *Grider,* 115 Ky. 755, 65 L. R. A. 455, 74 S. W. 1058; *Jahn* v. *Wm. H. McKnight & Co.,* 117 Ky. 661, 78 S. W. 862. The significant element in the relation of an employee and his employer is personal service. In Wood on Master and Servant, § 317, it is said: 'The real test by which to determine whether a person is acting as the servant of another is to ascertain whether, at the time when the injury was inflicted, he was subject to such person's orders and control, and was liable to be discharged by him for disobedience of orders or misconduct.' In other words, an 'employee' is one who works for and under the control of his employer. The mode of payment is a circumstance in solving the question whether the relation of master and servant exists, but it is not decisive of that question."

It seems indisputable that the deputy marshal is a Government officer. Mr. Justice Brown, in his concurring opinion in the case of *United States* v. *Andrew J. Matthews,* 173 U. S. 381, says that he thinks a deputy marshal is "beyond all peradventure an officer of the United States". The case of *Throop* v. *Langdon,* 40 Mich. 673, quoted in *State* v. *Johnson,* 123 Mo. 43, 27 S. W. 399, 401, says: "The officer is distinguished from the employee in the greater importance, dignity, and independence of his position; in being required to take an official oath, and perhaps to give an official bond; in the liability to be called to account as a public officer for misfeasance or nonfeasance in office, usually, though not necessarily, in the tenure of his position."

A statute in the State of North Carolina authorized a forest warden to summon any male resident to assist him in controlling fires. The warden summoned Moore, who was injured while aiding in fighting a fire. He filed a claim for compensation and the question arose whether he was engaged in the employment of the State. The court said:

> "If the fire warden had himself been injured while performing his duties, his right to compensation would hardly be questioned. Was not the plaintiff equally engaged in the employment of the State? He and the warden were engaged in the same service—the extinguishment of the fire. The fact that he was serving the State by the command or appointment of the warden does not change the nature of the service; he was acting in the capacity of a temporary warden by authority and, indeed, by the mandate of the law. 18 R. C. L. 577."
>
> *Moore* v. *State,* 200 N. C. 300; 156 S. E. 806, 808.

> "The context and the connection in which it [the word employee] is used must largely determine whether in a particular case the term includes a certain person."
>
> 20 C. J. 1242.

Section 5467 of the Revised Statute makes it a crime for "any person employed in any department of the postal service" to embezzle any letter, etc. In the case of *United States* v. *Hanna*, 4 New Mexico 644, 17 Pacific 79, it was held "That a stage driver employed by the stage company, which had a contract for carrying the mails, and who was sworn as a mail carrier, is an employee of the postal service, within the meaning of this section, though he was hired and paid by the stage company and received no compensation from the government". That, of course, was a criminal case and certainly the statute in a criminal case is construed more strictly than in a case like the present.

> "An employee of defendant railway company, having charge of its pumping station and water tank, informed the superintendent that he had to leave on business, and would leave his 14-year-old son in charge, and received the superintendent's permission to do so. *Held*, that the son was an 'employee' of the company."
> *Yazoo & M. V. R. Co.* v. *Slaughter*, 92 Miss. 289, 45 Southern 873.

> "The rule is well settled that a person who is procured by an employee to act as his substitute or to assist him in his duties, the employer assenting to the arrangement, occupies the position of an employee, and that the duty owed him by the employer is the same as that owed to other employees. And it does not make any difference that the substitute or assistant is promised no compensation for his services."
> 18 R. C. L. 577, sec. 83.

The Government argues that the service of a field deputy marshal, who later comes under the Civil Service Act, is not to be counted under the retirement legislation because of Section 693 (d), Title 5, U. S. C. A., which contains the provision "that these groups shall include only those employees whose tenure of employment is not intermittent nor

of uncertain duration". Petitioner, as a deputy marshal, "served continuously" from the date he took his oath of office on December 16, 1895, until April 30, 1902, a period of six years, four months and fourteen days (R. 14-15). During this time he devoted all of his time to the duties of the office, having no other income or occupation (R. 42). There was no intermission between the cessation of his service as a deputy marshal and the beginning of his service as a postmaster at Thomasville, Georgia. In fact, the Government's records show an overlapping of these two periods of service, which is probably an error (R. 22).

It may be pointed out that in the event of the death of a marshal the deputy marshal has to carry on in the name of the deceased until another marshal is appointed. (28 U. S. C. A. 506.) It could hardly be said that a deputy would be merely an employee of the marshal during such period.

It is significant, also that the instructions of the Attorney-General to the marshals cover the contingency of an incoming marshal's being called upon to make payments "on account of services and expenses of his predecessor's deputies" (R. 37). If a deputy is merely a personal employee of a marshal an incoming marshal would hardly be expected to pay his predecessor's deputies.

Two cases very much in point are *United States* v. *Fitzpatrick,* 13 Wall. 568, 576, and *United States* v. *Charles H. Manning,* 13 Wall. 578. It is decided in the *Fitzpatrick* case that it is not necessary before a person can be an employee of the United States that he have a commission or warrant of appointment or that he draw a salary. In the *Manning* case the question presented was whether certain guards who were appointed to assist the warden of the jails of the District of Columbia were employees of the Government. The appointment of these guards was not authorized by any statute, nor was their compensation prescribed by any

appropriation. They were selected and appointed by the warden under the authority of the head of the Department of the Interior. It was held that they were employees of the Government, for the reason that although the charge for their services was required to be approved by the warden, and included by him in his report, the report was nevertheless subject to revision by the Secretary of the Interior, who had the power to fix the amount of the guard's compensation.

Government's Cases Distinguished.

The Government cited four cases on this question:

Douglas v. *Wallace,* 161 U. S. 346;
Powell v. *United States,* 60 Fed. 687;
United States v. *McDonald,* 72 Fed. 898, 900; and
Wintermente v. *Smith,* 30 Fed. Cas. 17,897.

None of these cases deal with the question here involved. Each of them deals with the suability of the Government at the instance of a deputy marshal to recover his fees and these cases decide that the Government is not suable in such a case. As was pointed out in the *Powell* case, the statutes do not contain a promise direct to the deputy marshal covering his compensation. The statutes provide fees for the marshal "and a proper allowance to his deputies" (Revised Statutes 841). The *Powell* case points out further, "in contemplation of the law there can be no severance or division of interest in the fees between the marshal and his deputies for which each can severally make claim". In other words, in those days the Tucker Act had not been amended so as to exclude from claims on which the Government could be sued the claims of an officer for fees, salary, or compensation for official services. The courts in the cases relied upon by the Government merely refuse

to hold that the deputy marshal could sue the Government directly for his compensation in the absence of an express undertaking on the part of the Government to pay the deputy. As was pointed out in the *Powell* case, such holding would constitute a severance of the marshal's claim and subject the Government to numerous suits.

In the *McDonald* case the suit was filed by a lawyer who had been appointed by a District Attorney ostensibly as a clerk but to assist him in the duties of his office. The Attorney-General had authorized such appointment "on condition that the appointee should look solely to the District Attorney for his compensation which was to be paid out of the emoluments of the office". It is understandable that such an employee can not repudiate the terms of his employment.

The *Douglas* case and the *Wintermente* case are to the same effect.

The Government argues that a deputy is not an employee of the United States because he can not maintain a suit against the Government. The logical conclusion of this argument is a contention that a deputy marshal or even a marshal is not an employee of the Government today because the Tucker Act, as it reads at present, excludes from the jurisdiction of the District Court "cases brought to recover fees, salary, or compensation for official services of officers of the United States". Certainly, the Government would not pursue its contention to that length.

Point F.

The District Court had jurisdiction to render a declaratory judgment against the United States.

The Tucker Act conferred upon the District Court jurisdiction concurrent with the Court of Claims of all claims founded upon any contract, express or implied, with the

Government or for damages liquidated or unliquidated in cases not sounding in tort "in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, etc. * * *." This section of the statute concludes by providing that all suits brought and tried under it shall be tried by the court without a jury. Other sections of the Act (28 U. S. C. A. 761 through 765) provide a particular procedure for suits against the Government. Section 764 makes it the duty of the court to cause a written opinion to be filed, setting forth findings of facts and conclusions of law and to render judgment thereon. This section provides, further, that "if the suit be in equity or admiralty, the court shall proceed with the same according to the rules of such courts." It would seem that Congress intended these law suits to be governed by the same rules of procedure and be in all respects similar to other law suits except as the manner of conducting this type of litigation is changed by statute. It would seem, further, that when Congress on June 14, 1934, adopted the Declaratory Judgments Act which, in itself relates to matters of practice and procedure, they intended that it would apply to all cases in the courts of the United States. For the statement that the Declaratory Judgment Act relates only to matters of practice and procedure, petitioner cites *Nashville C. & St. L. Railway Co.* v. *Wallace,* 288 U. S. 249, and Borchard on Declaratory Judgments, page 299.

There is no reason apparent why a declaratory judgment is not proper against the United States. The truth is, as has been pointed out by writers on the subject, that every judgment against the United States is only declaratory in its nature. It is not coercive. Nothing can be levied upon. It simply fixes or declares rights.

The Government relies upon *United States* v. *Jones*, 131 U. S. 1, for the proposition that there is no jurisdiction under the Tucker Act to award judgments against the United States except for "money found due." The *Jones* case used that language but the Court was not referring to whether or not the money was actually due at the date of the judgment. In that case the plaintiff was seeking by specific performance to compel the Government to issue and deliver a patent for land. The Court said that the language of Congress "confines the subject matter to cases in which the petitioner sets up a moneyed demand as due from the Government."

Although the Circuit Court of Appeals did not deal with Points E and F, in this brief, we have discussed them since, as we understand it, the Supreme Court can, under the authority of its decision in the case of *Cole* v. *Ralph*, 252 U. S. 286, proceed to a complete decision and not confine itself to those questions considered by the lower court.

Conclusion.

Therefore, we respectfully submit that this case is one calling for the exercise by this Court of its supervisory powers in order that all of the Civil Service employees of the United States may know whether they have a justiciable right in return for the money which they are paying into the Treasury each month, and that, to such an end, a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals and finally reverse it.

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APPENDIX.

Section 8 (a) of the Act of June 16, 1933, 48 Stat. 283, 305, U. S. C., Title 5, Section 692 (d), is as follows:

692d. *Involuntary Separation.*—

(a) Whenever at any time hereafter prior to July 1, 1935, any employee of the United States or the District of Columbia to whom this chapter applies, who has an aggregate period of service of at least thirty years computed as prescribed in section 695a of this chapter is involuntarily separated from the service for reasons other than his misconduct, such employee shall be entitled to an annuity computed as provided in section 694a of this chapter payable from the civil service retirement and disability fund less a sum equal to 3½ per centum of such annuity: Provided That when an annuitant hereunder attains the age which would have been the retirement age prescribed for automatic separation from the service applicable to such annuitant had he continued in the service to such retirement age, such deduction from the annuity shall cease. If and when any such annuitant shall be reemployed in the service of the District of Columbia or the United States (including any corporation the majority stock of which is owned by the United States), the right to the annuity provided by this section shall cease and the subsequent annuity rights of such person shall be determined in accordance with the applicable provisions of retirement law existing at the time of the subsequent separation of such person from the service. (June 16, 1933, c. 101, 8 (a) 48 Stat. 305.)

Tucker Act.

The relevant portion of the Tucker Act is as follows:

The District Courts shall have original jurisdiction, as follows: Suits against United States—Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United

States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, * * *." 28 U. S. C. A. 41 (20).